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In the Supreme Court of the United States

OCTOBER TERM, 1980

HADDON HOUSE FOOD PRODUCTS, INC. AND FLAVOR DELIGHT, INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the Board exceeded its remedial authority in ordering limited union access to company premises in order to remedy "repeated and egregious" violations of the Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B-1 to B-24) is reported at 640 F. 2d 392. The decision and order of the National Labor Relations Board (Pet. App. C-1 to C-61) are reported at 242 N.L.R.B. 1057.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1981 (Pet. App. B-1). A petition for rehearing was denied on February 28, 1981 (Pet. App. A-1 to A-2). On May 12, 1981, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 29, 1981 (Pet. App. AA-1). The petition was filed on June 26, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), is set forth in pertinent part at page 3 of the petition.

STATEMENT

1. The Union[1] began an organizational drive among the Company's[2] employees on November 13, 1975. By the end of the day, 21 of the Company's approximately 60 employees had signed Union authorization cards (Pet. App. B-2, C-24 to C-26).

On the following day, the Company summarily discharged seven employees who had signed Union cards the day before, including two of the principal solicitors in the Union campaign (Pet. App. B-2 to B-3, C-24). Later that same day the rest of the employees were called to a special meeting, during which Company owner Harold Anderson promised pay raises to the assembled employees (*id.* at C-38 to C-39).

On November 18, the seven discharged employees were joined by 14 other employees in a strike to protest the discharges (Pet. App. C-24 to C-25).[3] Thereafter, the Company sent letters to its employees—including some of those who had been discharged and some of the strikers—at their homes. Some of the letters advised that some employees were being suspended, including a number of the strikers. Other letters invited employees to return to their jobs, again including some of the strikers. When the striking employees

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[1]Teamsters Local Union No. 115, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[2]Petitioners are affiliated businesses that share the same premises (Pet. App. C-23). They are referred to herein jointly as "the Company."

[3]On November 25, an eighth employee was summarily discharged after she was seen chatting with some pickets on the sidewalk (Pet. App. C-25).

sought to accept the Company's offer and volunteered unconditionally to return to work, however, the Company denied them reinstatement (*id.* at B-4, C-2 to C-3, C-25).

2. The Board found that the Company violated Sections 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by discharging eight employees on account of their activities on behalf of the Union and by refusing to reinstate employees who went on strike to protest the Company's unfair labor practices following the employees' unconditional offer to return to work. The Board also found that the Company violated Section 8(a)(1) of the Act by threatening to discharge employees because of their Union activities, by telling employees that others had been discharged because of such activities and by promising benefits to employees to discourage their Union activities (Pet. App. C-4 to C-5, C-58 to C-59).

The administrative law judge (ALJ) had recommended a conventional cease and desist, reinstatement, and backpay order (Pet. App. C-59 to C-60). In addition, because the Company had committed "outrageous" and "pervasive" unfair labor practices that precluded the holding of a fair election, and notwithstanding the fact that the Union never had been designated by a majority of the employees as their collective bargaining representative,[4] the ALJ recommended that the Company be required to bargain with the Union as the exclusive representative of all employees in the bargaining unit (Pet. App. C-57 to C-58, C-61).

The Board, with Chairman Fanning and Member Jenkins dissenting, declined to issue the recommended bargaining order. Instead, in addition to the conventional remedies recommended by the ALJ, the Board imposed several

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[4]The ALJ found (Pet. App. C-52) that "at best" the Union had obtained valid authorization cards from "27 out of the 59 employees" in the bargaining unit.

extraordinary remedies "designed to dissipate as much as possible the lingering atmosphere of fear created by [the Company's] unlawful conduct and to ensure that if the question of union representation is placed before employees in the future they will be able to voice a free choice" (Pet. App. C-6). The Board's order requires the Company to: (a) mail notices to all employees, both presently employed and those on the payroll at the time the unfair labor practices were committed, signed by the Company's owner and manager, setting forth the conduct from which the Company will refrain in the future; (b) publish copies of the notice in appropriate Company publications and in local newspapers of general circulation twice a week for four weeks; (c) have its owner and manager read the notice to the assembled employees in the presence of a Board agent; (d) upon request, grant the Union and its representatives reasonable access to Company bulletin boards and all places where notices to employees are customarily posted for two years (or until a fair election has been certified); (e) upon request, grant the Union reasonable access to employees on Company premises in nonwork areas and on nonwork time for two years (or until a fair election has been certified); (f) upon request, provide the Union with the names and addresses of its current employees for one year; (g) afford the Union notice of, and equal time and facilities for it to respond to, Company speeches to its employees concerning union representation for two years (or until a fair election has been certified); and (h) permit the Union to deliver a 30-minute speech to employees on Company time prior to any Board election held within two years (*id.* at C-7 to C-8, C-11 to C-13).

3. The court of appeals upheld the Board's finding of unfair labor practices and enforced the Board's order in all respects, except that it refused to require the Company owner and manager personally to read the notice described

in item (c), *supra* (Pet. App. B-22 to B-24).[5] The court agreed with the Board that "the Employer's conduct constituted 'a well-orchestrated antiunion campaign that featured repeated and egregious violations * * * of the Act' " (*id.* at B-5, quoting *id.* at C-15 (Chairman Fanning and Member Jenkins, concurring in part and dissenting in part)). Noting (*id.* at B-14, quoting *id.* at C-6) that the Board's remedial order was "designed to reassure interested parties of their rights and to assist the employees in hearing the Union's side of the story despite the 'lingering atmosphere of fear' the Employer had created," the court rejected the Company's contention that only "hardened recidivism" would warrant the remedies imposed. The court explained (*id.* at B-15; footnote omitted):

> [A]n employer who strikes the first blow hard enough may not need to strike another. The measure of the Board's remedial power cannot depend solely on the length or frequency of the Employer's conduct: the crucial factor is the effect of that conduct on the employees.

With specific respect to the access remedies imposed by the Board,[6] the court rejected (Pet. App. B-16) as "fl[ying] in the face of the Board's findings" the Company's assertion that such remedies were unwarranted because the Union had been able to engage in direct solicitation without interference by the Company. The court also noted (*ibid.*) that,

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[5]The court modified the order to require the Company to " 'have a responsible officer of [the Company] read' the Board notice" (Pet. App. B-24).

[6]Those remedies—items (d), (e), (g) and (h) at page 4, *supra*—are the only parts of the Board's order that the Company is challenging here.

while the remedies imposed are "severe," they "are not new departures."[7]

ARGUMENT

1. Section 10(c), of the Act, 29 U.S.C. 160(c), "charges the Board with the task of devising remedies to effectuate the policies of the Act." *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). "The Board's power is a broad discretionary one, subject to limited judicial review," *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964), "[b]ecause the relation of remedy to policy is peculiarly a matter for administrative competence." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941). "In fashioning its remedies under the broad provisions of § 10(c) * * *, the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969). Hence, in order to challenge successfully a remedy prescribed by the Board, a party must show "that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943). Here, the court of appeals properly applied these principles in concluding that the Board did not abuse its remedial authority in granting the Union access to Company facilities. Further review of this fact-bound question is therefore unwarranted.

2. The Company challenges those aspects of the Board's order that afford the Union access to the employees at the workplace for a two-year period (or until a fair election has

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[7]The court of appeals also upheld the Board's refusal to issue a bargaining order in the absence of a prior showing of majority support (Pet. App. B-8 to B-11). The Union has filed a petition for a writ of certiorari on that issue (No. 80-1995, filed May 27, 1981), which the Board and the Company have opposed.

been certified, if earlier)—the requirements that the Company grant the Union reasonable access to Company bulletin boards and other posting places, that it give the Union reasonable access to employees in nonwork areas during nonwork times, that it afford the Union equal time and facilities to respond to any Company speeches concerning Union representation, and that it permit the Union to deliver one 30-minute speech to employees on Company time in the event of a Board election. The Company does not challenge the Board's power to grant such relief in appropriate circumstances, but argues only that the access remedies were not warranted here because the Company was a "one-time offender" (Pet. 9). As the court of appeals noted (Pet. App. B-15), however, it is not the length or frequency of an employer's conduct, but rather the effect of that conduct on the employees, that is determinative. In response to the Company's attempt to distinguish its case from that of J.P. Stevens & Co., the court remarked (*ibid.* n.8) that the latter case "does not support a policy of indulgence toward first offenders."[8]

3. Petitioners' reliance (Pet. 7-8) on *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956), for the proposition that the Board is required to determine if the Union has alternative means of access to the employees before ordering the Company to allow the Union access to its property is misplaced. *Babcock & Wilcox* held only that an employer *who had not otherwise violated the Act* did not commit an unfair

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[8]Contrary to petitioners' assertion (Pet. 9-10), the courts have not limited access remedies to recidivist employers. See *e.g.*, *NLRB* v. *H.W. Elson Bottling Co.*, 379 F. 2d 223, 226-227 (6th Cir. 1967) (access to bulletin boards, right of union to give campaign speech on company premises in the event the company addresses its employees on the question of union representation); *Decaturville Sportswear Co.* v. *NLRB*, 406 F. 2d 886, 889 (6th Cir. 1969) (access to bulletin boards, plant approaches and parking lot).

labor practice by denying union organizers access to company property where the organizers had reasonable alternative means of communicating with employees. As the court of appeals correctly pointed out (Pet. App. B-16; emphasis in original; footnote omitted):

> *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and its progeny * * * [do not] deal with the *remedial* powers of the Board; they only seek to determine when an employer's denial of access to his property can itself be deemed an unfair labor practice * * *.

United Steelworkers of America v. *NLRB (Florida Steel Corp.)*, 646 F. 2d 616 (D.C. Cir. 1981), is not to the contrary. The issue in that case was whether the Board was warranted in ordering corporatewide remedies, including union access, to remedy "a relatively minor violation of the Act" (*id.* at 624) at one plant. The court, consistent with its holding in this case, acknowledged that "the principles announced in *Babcock* do not govern the propriety of union access granted as a remedial measure" (*id.* at 637). However, the court found that the Board had failed to demonstrate that corporatewide remedies were "necessary to offset coercive or chilling effects * * * produced on a corporatewide basis" (*id.* at 640). There was no necessity for the Board to make such a showing here, however, since the Company has only a single plant. And, as the court found (Pet. App. B-15 to B-17), the Board did show that access remedies were necessary to dissipate the effects of the Company's coercive conduct at that facility.[9]

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[9]In any event, even if the decision in *Florida Steel Corp.* conflicted with the decision below, such an intra-circuit conflict would not warrant review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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